

SENATE, No. 3233

STATE OF NEW JERSEY 217th LEGISLATURE

INTRODUCED MAY 25, 2017

Sponsored by:

Senator JEFF VAN DREW

District 1 (Atlantic, Cape May and Cumberland)

SYNOPSIS

Modifies performance and maintenance guarantee requirements under "Municipal Land Use Law."

CURRENT VERSION OF TEXT

As introduced.



1 AN ACT concerning performance and maintenance guarantees under
2 the "Municipal Land Use Law" and amending P.L.1975, c.291.

3
4 **BE IT ENACTED** *by the Senate and General Assembly of the State*
5 *of New Jersey:*

6
7 1. Section 41 of P.L.1975, c.291 (C.40:55D-53) is amended to
8 read as follows:

9 41. Guarantees required; surety; release. a. Before **【recording】**
10 filing of final subdivision plats or recording of minor subdivision
11 deeds or as a condition of final site plan approval or as a condition
12 to the issuance of a zoning permit pursuant to subsection d. of
13 section 52 of P.L.1975, c.291 (C.40:55D-65), the **【approving**
14 **authority】** municipality may require and shall accept in accordance
15 with the standards adopted by ordinance and regulations adopted
16 pursuant to section 1 of P.L.1999, c.68 (C.40:55D-53a) for the
17 purpose of assuring the installation and maintenance of certain on-
18 tract improvements, the furnishing of a performance guarantee, and
19 provision for a maintenance guarantee in accordance with
20 paragraphs (1) and (2) of this subsection. If a municipality has
21 adopted an ordinance requiring a successor developer to furnish a
22 replacement performance guarantee, as a condition to the approval
23 of a permit update under the State Uniform Construction Code, for
24 the purpose of updating the name and address of the owner of
25 property on a construction permit, the governing body may require
26 and shall accept in accordance with the standards adopted by
27 ordinance and regulations adopted pursuant to section 1 of
28 P.L.1999, c.68 (C.40:55D-53a) for the purpose of assuring the
29 installation and maintenance of certain on-tract improvements, the
30 furnishing of a performance guarantee, and provision for a
31 maintenance guarantee, in accordance with paragraphs (1) and (2)
32 of this subsection.

33 (1) (a) **【The furnishing of】** If required, the developer shall
34 furnish a performance guarantee in favor of the municipality in an
35 amount not to exceed 120% of the cost of installation of only those
36 improvements required by an approval or developer's agreement,
37 ordinance, or regulation to be dedicated to a public entity, and that
38 have not yet been installed, which cost shall be determined by the
39 municipal engineer, according to the method of calculation set forth
40 in section 15 of P.L.1991, c.256 (C.40:55D-53.4), for the following
41 improvements **【which the approving authority may deem necessary**
42 **or appropriate including】** as shown on the approved plans or plat:
43 streets, **【grading,】** pavement, gutters, curbs, sidewalks, street
44 lighting, **【shade】** street trees, surveyor's monuments, as shown on

EXPLANATION – Matter enclosed in bold-faced brackets **【thus】** in the above bill is
not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

1 the final map and required by "the map filing law," P.L.1960, c.141
2 (C.46:23-9.9 et seq.; repealed by section 2 of P.L.2011, c.217) or
3 N.J.S.46:26B-1 through N.J.S.46:26B-8, water mains, **【**culverts,
4 storm sewers,**】** sanitary sewers **【**or other means of sewage
5 disposal**】**, community septic systems, drainage structures, **【**erosion
6 control and sedimentation control devices,**】** public improvements of
7 open space, and **【**, in the case of site plans only, other on-site
8 improvements and landscaping**】** any grading necessitated by the
9 preceding improvements.

10 The municipal engineer shall prepare an itemized cost estimate
11 of the improvements covered by the performance guarantee, which
12 itemized cost estimate shall be appended to each performance
13 guarantee posted by the obligor.

14 (b) A municipality may also require a performance guarantee to
15 include, within an approved phase or section of a development
16 privately-owned perimeter buffer landscaping, as required by local
17 ordinance or imposed as a condition of approval.

18 At the developer's option, a separate performance guarantee may
19 be posted for the privately-owned perimeter buffer landscaping.

20 (c) In the event that the developer shall seek a temporary
21 certificate of occupancy for a development, unit, building, or phase
22 of development, as a condition of the issuance thereof, the
23 developer shall, if required by an ordinance adopted by the
24 municipality, furnish a separate guarantee, referred to herein as a
25 "temporary certificate of occupancy bond," in favor of the
26 municipality in an amount equal to 120% of the cost of installation
27 of only those improvements or items which remain to be completed
28 or installed under the terms of the temporary certificate of
29 occupancy and which are required to be installed or completed as a
30 condition precedent to the issuance of the permanent certificate of
31 occupancy for the development, unit, building or phase of
32 development. Upon posting of a "temporary certificate of
33 occupancy bond," all sums remaining under a performance
34 guarantee, required pursuant to subparagraph (a) of this paragraph,
35 which relate to the development, unit, building, or phase of
36 development for which the temporary certificate of occupancy is
37 sought, shall be released. At no time may a municipality hold more
38 than one guarantee or bond of any type with respect to the same line
39 item. The temporary certificate of occupancy bond shall be
40 released upon the issuance of a permanent certificate of occupancy
41 with regard to the development, unit, building, or phase as to which
42 the temporary certificate of occupancy relates.

43 (d) In addition to a performance guarantee required pursuant to
44 subparagraph (a) of this paragraph, a developer shall, if required by
45 an ordinance adopted by the municipality, furnish to the
46 municipality a separate guarantee, referred to herein as a "safety
47 and stabilization bond," in favor of the municipality, to be available

1 to the municipality solely for the purpose of returning property that
2 has been disturbed to a safe and stable condition or otherwise
3 implementing measures to protect the public from access to an
4 unsafe or unstable condition, only in the circumstance that:

5 (i) site disturbance has commenced and, thereafter, all work on
6 the development has ceased for a period of at least 60 consecutive
7 days following such commencement for reasons other than force
8 majeure, and

9 (ii) work has not recommenced within 30 days following the
10 provision of written notice by the municipality to the developer of
11 the municipality's intent to claim payment under the bond. A
12 municipality shall not provide notice of its intent to claim payment
13 under a "safety and stabilization bond" until a period of at least 60
14 days has elapsed during which all work on the development has
15 ceased for reasons other than force majeure. A municipality shall
16 provide written notice to a developer by certified mail or other form
17 of delivery providing evidence of receipt.

18 The amount of a "safety and stabilization bond" for a
19 development with bonded improvements in an amount not
20 exceeding \$100,000 shall be \$5,000.

21 The amount of a "safety and stabilization bond" for a
22 development with bonded improvements exceeding \$100,000 shall
23 be calculated as a percentage of the bonded improvement costs of
24 the development or phase of development as follows:

25 \$5,000 for the first \$100,000 of bonded improvement costs, plus
26 two and a half percent of bonded improvement costs in excess of
27 \$100,000 up to \$1,000,000, plus
28 one percent of bonded improvement costs in excess of
29 \$1,000,000.

30 (2) **【Provision for】** (a) If required, the developer shall post with
31 the municipality, prior to the release of a performance guarantee
32 required pursuant to subparagraph (a), subparagraph (b), or both
33 subparagraph (a) and subparagraph (b) of paragraph (1) of this
34 subsection, a maintenance guarantee **【**to be posted with the
35 governing body for a period not to exceed two years after final
36 acceptance of the improvement**】** in an amount not to exceed 15% of
37 the cost of the **【improvement】** installation of the improvements
38 which are being released.

39 (b) If required, the developer shall post with the municipality,
40 upon the inspection and issuance of final approval of the following
41 private site improvements by the municipal engineer, a maintenance
42 guarantee in an amount not to exceed 15% of the cost of the
43 installation of the following private site improvements: stormwater
44 management basins, in-flow and water quality structures within the
45 basins, and the out-flow pipes and structures of the stormwater
46 management system, if any, which cost shall be determined **【**by the

1 municipal engineer] according to the method of calculation set
2 forth in section 15 of P.L.1991, c.256 (C.40:55D-53.4).

3 (c) The term of the maintenance guarantee shall be for a period
4 not to exceed two years and shall automatically expire at the end of
5 the established term.

6 (3) In the event that other governmental agencies or public
7 utilities automatically will own the utilities to be installed or the
8 improvements are covered by a performance or maintenance
9 guarantee to another governmental agency, no performance or
10 maintenance guarantee, as the case may be, shall be required by the
11 municipality for such utilities or improvements.

12 b. The time allowed for installation of the improvements for
13 which the performance guarantee has been provided may be
14 extended by the governing body by resolution. As a condition or as
15 part of any such extension, the amount of any performance
16 guarantee shall be increased or reduced, as the case may be, to an
17 amount not to exceed 120% of the cost of the installation, which
18 cost shall be determined by the municipal engineer according to the
19 method of calculation set forth in section 15 of P.L.1991, c.256
20 (C.40:55D-53.4) as of the time of the passage of the resolution.

21 c. If the required bonded improvements are not completed or
22 corrected in accordance with the performance guarantee, the obligor
23 and surety, if any, shall be liable thereon to the municipality for the
24 reasonable cost of the improvements not completed or corrected and
25 the municipality may either prior to or after the receipt of the
26 proceeds thereof complete such improvements. Such completion or
27 correction of improvements shall be subject to the public bidding
28 requirements of the "Local Public Contracts Law," P.L.1971, c.198
29 (C.40A:11-1 et seq.).

30 d. (1) Upon substantial completion of all required street
31 improvements (except for the top course) and appurtenant utility
32 improvements, and the connection of same to the public system, the
33 obligor may request of the governing body in writing, by certified
34 mail addressed in care of the municipal clerk, that the municipal
35 engineer prepare, in accordance with the itemized cost estimate
36 prepared by the municipal engineer and appended to the
37 performance guarantee pursuant to subsection a. of this section, a
38 list of all uncompleted or unsatisfactory completed improvements.
39 If such a request is made, the obligor shall send a copy of the
40 request to the municipal engineer. The request shall indicate which
41 improvements have been completed and which improvements
42 remain uncompleted in the judgment of the obligor. Thereupon the
43 municipal engineer shall inspect all bonded improvements covered
44 by obligor's request and shall file a detailed list and report, in
45 writing, with the governing body, and shall simultaneously send a
46 copy thereof to the obligor not later than 45 days after receipt of the
47 obligor's request.

1 (2) The list prepared by the municipal engineer shall state, in
2 detail, with respect to each bonded improvement determined to be
3 incomplete or unsatisfactory, the nature and extent of the
4 incompleteness of each incomplete improvement or the nature and
5 extent of, and remedy for, the unsatisfactory state of each
6 completed improvement determined to be unsatisfactory. The
7 report prepared by the municipal engineer shall identify each
8 improvement determined to be complete and satisfactory together
9 with a recommendation as to the amount of reduction to be made in
10 the performance guarantee relating to the completed and
11 satisfactory improvement, in accordance with the itemized cost
12 estimate prepared by the municipal engineer and appended to the
13 performance guarantee pursuant to subsection a. of this section.

14 e. (1) The governing body, by resolution, shall either approve
15 the bonded improvements determined to be complete and
16 satisfactory by the municipal engineer, or reject any or all of these
17 improvements upon the establishment in the resolution of cause for
18 rejection, and shall approve and authorize the amount of reduction
19 to be made in the performance guarantee and the “safety and
20 stabilization bond” relating to the improvements accepted, in
21 accordance with the itemized cost estimate prepared by the
22 municipal engineer and appended to the performance guarantee
23 pursuant to subsection a. of this section. This resolution shall be
24 adopted not later than 45 days after receipt of the list and report
25 prepared by the municipal engineer. Upon adoption of the
26 resolution by the governing body, the obligor shall be released from
27 all liability pursuant to its performance guarantee and “safety and
28 stabilization bond,” with respect to those approved bonded
29 improvements, except for that portion adequately sufficient to
30 secure completion or correction of the improvements not yet
31 approved; provided that 30% of the amount of the total performance
32 guarantee and “safety and stabilization bond” posted may be
33 retained to ensure completion and acceptability of all
34 improvements.

35 For the purpose of releasing the obligor from liability pursuant to
36 its performance guarantee and “safety and stabilization bond,” the
37 amount of the performance guarantee and “safety and stabilization
38 bond” attributable to each approved bonded improvement shall be
39 reduced by the total amount for each such improvement, in
40 accordance with the itemized cost estimate prepared by the
41 municipal engineer and appended to the performance guarantee
42 pursuant to subsection a. of this section, including any contingency
43 factor applied to the cost of installation. If the sum of the approved
44 bonded improvements would exceed 70 percent of the total amount
45 of the performance guarantee, then the municipality may retain 30
46 percent of the amount of the total performance guarantee and
47 “safety and stabilization bond” to ensure completion and
48 acceptability of all improvements, as provided above, except that

1 any amount of the performance guarantee attributable to bonded
2 improvements for which a “temporary certificate of occupancy
3 bond” has been posted shall be released from the performance
4 guarantee even if such release would reduce the amount held by the
5 municipality below 30 percent.

6 (2) If the municipal engineer fails to send or provide the list and
7 report as requested by the obligor pursuant to subsection d. of this
8 section within 45 days from receipt of the request, the obligor may
9 apply to the court in a summary manner for an order compelling the
10 municipal engineer to provide the list and report within a stated
11 time and the cost of applying to the court, including reasonable
12 attorney's fees, may be awarded to the prevailing party.

13 If the governing body fails to approve or reject the improvements
14 determined by the municipal engineer to be complete and
15 satisfactory or reduce the performance guarantee for the complete
16 and satisfactory improvements within 45 days from the receipt of
17 the municipal engineer's list and report, the obligor may apply to
18 the court in a summary manner for an order compelling, within a
19 stated time, approval of the complete and satisfactory improvements
20 and approval of a reduction in the performance guarantee for the
21 approvable complete and satisfactory improvements in accordance
22 with the itemized cost estimate prepared by the municipal engineer
23 and appended to the performance guarantee pursuant to subsection
24 a. of this section; and the cost of applying to the court, including
25 reasonable attorney's fees, may be awarded to the prevailing party.

26 (3) In the event that the obligor has made a cash deposit with the
27 municipality or approving authority as part of the performance
28 guarantee, then any partial reduction granted in the performance
29 guarantee pursuant to this subsection shall be applied to the cash
30 deposit in the same proportion as the original cash deposit bears to
31 the full amount of the performance guarantee.

32 f. If any portion of the required improvements is rejected, the
33 approving authority may require the obligor to complete or correct
34 such improvements and, upon completion or correction, the same
35 procedure of notification, as set forth in this section shall be
36 followed.

37 g. Nothing herein, however, shall be construed to limit the right
38 of the obligor to contest by legal proceedings any determination of
39 the governing body or the municipal engineer.

40 h. (1) The obligor shall reimburse the municipality for **[all]**
41 reasonable inspection fees paid to the municipal engineer for the
42 foregoing inspection of improvements; **[provided that the]** which
43 fees shall not exceed the sum of the amounts set forth in
44 subparagraphs (a) and (b) of this paragraph. The municipality may
45 require **[of]** the developer **[a deposit for]** to post the inspection
46 fees in escrow in an amount:

1 (a) not to exceed **【**, except for extraordinary circumstances, the
2 greater of \$500 or **】** 5% of the cost of bonded improvements that are
3 subject to a performance guarantee under subparagraph (a),
4 subparagraph (b), or both subparagraph (a) and subparagraph (b) of
5 paragraph (1) of subsection a. of this section; and

6 (b) not to exceed 5% of the cost of private site improvements
7 that are not subject to a performance guarantee under subparagraph
8 (a) of paragraph (1) of subsection a. of this section, which cost shall
9 be determined pursuant to section 15 of P.L.1991, c.256 (C.40:55D-
10 53.4).

11 (2) For those developments for which the inspection fees **【are】**
12 total less than \$10,000, fees may, at the option of the developer, be
13 paid in two installments. The initial amount deposited in escrow by
14 a developer shall be 50% of the inspection fees. When the balance
15 on deposit drops to 10% of the inspection fees because the amount
16 deposited by the developer has been reduced by the amount paid to
17 the municipal engineer for **【inspection】** inspections, the developer
18 shall deposit the remaining 50% of the inspection fees.

19 (3) For those developments for which the inspection fees **【are】**
20 total \$10,000 or greater, fees may, at the option of the developer, be
21 paid in four installments. The initial amount deposited in escrow by
22 a developer shall be 25% of the inspection fees. When the balance
23 on deposit drops to 10% of the inspection fees because the amount
24 deposited by the developer has been reduced by the amount paid to
25 the municipal engineer for inspection, the developer shall make
26 additional deposits of 25% of the inspection fees. **【The municipal**
27 **engineer shall not perform any inspection if sufficient funds to pay**
28 **for those inspections are not on deposit.】**

29 (4) If the municipality determines that the amount in escrow for
30 the payment of inspection fees, as calculated pursuant to
31 subparagraphs (a) and (b) of paragraph (1) of this subsection, is
32 insufficient to cover the cost of additional required inspections, the
33 municipality may require the developer to deposit additional funds
34 in escrow provided that the municipality delivers to the developer a
35 written inspection escrow deposit request, signed by the municipal
36 engineer, which: informs the developer of the need for additional
37 inspections, details the items or undertakings that require
38 inspection, estimates the time required for those inspections, and
39 estimates the cost of performing those inspections.

40 i. In the event that final approval is by stages or sections of
41 development pursuant to subsection a. of section 29 of P.L.1975,
42 c.291 (C.40:55D-38), the provisions of this section shall be applied
43 by stage or section.

44 j. To the extent that any of the improvements have been
45 dedicated to the municipality on the subdivision plat or site plan,
46 the municipal governing body shall be deemed, upon the release of
47 any performance guarantee required pursuant to subsection a. of

1 this section, to accept dedication for public use of streets or roads
2 and any other improvements made thereon according to site plans
3 and subdivision plats approved by the approving authority, provided
4 that such improvements have been inspected and have received
5 final approval by the municipal engineer.

6 (cf: P.L.2013, c.123, s.3)

7
8 2. This act shall take effect immediately.

9
10
11 STATEMENT

12
13 This bill would modify the requirements for furnishing
14 performance and maintenance guarantees under the “Municipal
15 Land Use Law.” Performance and maintenance guarantees ensure
16 that improvements required to be made by a developer under a
17 development approval are completed and maintained.

18 Under current law, a municipality may require a developer to
19 post performance guarantees to ensure that certain types of
20 improvements are completed. This may include improvements that
21 are not being dedicated to a public entity. Under the bill, a
22 municipality would only be able to require developers to post
23 performance guarantees that cover improvements being dedicated to
24 a public entity.

25 The one exception to this is that a municipality may require a
26 performance guarantee for privately-owned perimeter buffer
27 landscaping. The bill allows a developer to opt to post a separate
28 performance guarantee for this item.

29 In addition, the bill eliminates the following types of
30 improvements from the list of improvements that may be subject to
31 a performance guarantee requirement under current law: culverts,
32 storm sewers, erosion control and sedimentation control devices,
33 other on-site improvements, and landscaping. The bill also
34 modifies the description of some of the types of improvements that
35 may currently be subject to a performance guarantee requirement.

36 The bill authorizes municipalities to require two additional types
37 of guarantees: a “temporary certificate of occupancy bond,” and a
38 “safety and stabilization bond.”

39 Under the bill, if a developer seeks a temporary certificate of
40 occupancy for a development, unit, building, or phase of
41 development, a municipality may require the developer to furnish a
42 “temporary certificate of occupancy bond” in favor of the
43 municipality in an amount equal to 120% of the cost of installation
44 of improvements which remain to be completed and which are
45 required to be completed prior to the issuance of the permanent
46 certificate of occupancy. Upon posting a “temporary certificate of
47 occupancy bond,” all sums remaining under a performance

1 guarantee would be released because the new bond would
2 adequately ensure completion of the improvements.

3 The bill would authorize a municipality to require a developer to
4 furnish a “safety and stabilization bond,” which would provide the
5 municipality a source of funding to return property to a safe and
6 stable condition or to implement measures to protect the public
7 from access to an unsafe or unstable condition. A municipality
8 could claim payment under this bond if a developer ceases all work
9 on the development for at least 60 consecutive days and does not
10 recommence work within 30 days after the municipality notifies the
11 developer of the municipality’s intent to claim payment under the
12 bond. The bill specifies the manner of calculating the amount of a
13 “safety and stabilization bond.”

14 The bill also modifies provisions of law that control the posting
15 of maintenance guarantees. Under current law, a municipality may
16 require a developer to provide a maintenance guarantee for a period
17 of two years after the completion and acceptance of an
18 improvement in an amount not to exceed 15% of the cost of the
19 improvement. Under the bill, a municipality may require a
20 developer to provide a maintenance guarantee for: improvements
21 that were the subject of a performance guarantee, and specific
22 private stormwater management specific improvements.

23 The bill changes the current requirements concerning a
24 developer’s responsibility to pay fees to cover the municipal
25 engineer’s inspection of improvements completed by the developer.
26 Under the bill, a developer will be required to reimburse a
27 municipality for reasonable inspection fees paid to the municipal
28 engineer for the inspection of improvements. A municipality may
29 require a developer to post in escrow for this purpose an amount not
30 to exceed 5% of the cost of: bonded improvements that are subject
31 to a performance guarantee, and private site improvements that are
32 not subject to a performance guarantee.

33 The bill also deletes from current law a provision that prohibits a
34 municipal engineer from performing an inspection if there are
35 insufficient funds to pay for those inspections. The bill authorizes a
36 municipality that determines there are insufficient funds in escrow
37 to cover the cost of additional required inspections to require the
38 developer to deposit additional funds in escrow provided that the
39 municipality delivers to the developer a written inspection escrow
40 deposit request, specifying details about the additional required
41 inspections.